FILED
DEC 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 07-587

IN THE UNITED STATES SUPREME COURT

COVENANT MEDIA OF SOUTH CAROLINA, LLC,

Petitioner,

v.

CITY OF NORTH CHARLESTON, SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

In response to Covenant Media's petition, Respondent takes the absurd position that this case is not about a prior restraint on speech or expressive conduct, but rather about the City of North Charleston's regulation of construction projects. See Brief in Opposition, p. 7. Not only is this assertion contrary to the position taken by the Fourth Circuit below, but it also contradicts decisions from this Court and the circuit courts that have explicitly held that the use of signs, including billboards, is protected by the First Amendment. Respondent's attempts to diminish the important free speech implications at issue in this case are unpersuasive.

The City's effort to construe its permitting requirement for signs as only being applicable to billboards is belied by the plain terms of its Sign Regulations. While this case certainly arises out of Covenant Media's application for an outdoor advertising sign, this does not alter the fact that the City's Sign Regulations operated as a prior restraint on practically all speech through signs.

Finally, the City's attempt to characterize the case law relied upon by Petitioner as uniform with respect to *billboards*, intentionally overlooks the fact that this Court's holding in *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S. Ct. 775 (2002), and its subsequent application in sign cases, has been extended to cases involving other speech activities, such as demonstrations and festivals. The disparity among the circuit courts as to the proper extension of *Thomas* in prior restraint cases warrants review. Therefore, Covenant Media's petition for writ of certiorari should be granted.

I. THE FIRST AMENDMENT IMPLICATIONS OF SIGN REGULATION CANNOT BE SERIOUSLY DISPUTED.

This Court has often acknowledged that the control of the medium of speech or of the mechanism by which speech is delivered is tantamount to control of the speech itself. For example, the regulation of newsracks is subject to constitutional protections. *E.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 415, 113 S. Ct. 1505, 1509 (1993) (newsracks entitled to First Amendment protection as the "manner" by which speech is distributed); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 108 S. Ct. 2138 (1988). Signs are, of course, an even more fundamental medium of speech. *City of Ladue v. Gilleo*, 512 U.S. 43, 54-55, 114 S. Ct. 2038, 2045 (1994) (acknowledging that signs are a form of protected expression); *Metromedia v. City of San Diego*, 453 U.S. 490, 501, 101 S. Ct. 2882, 2889 (1981) ("Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages"). Thus, the City's contention that its Sign Regulations were designed only to regulate construction projects, and therefore have no impact on speech activity, is mistaken.

Such an approach ignores not only *Ladue* and *Metromedia*, but also this Court's subsequent commentary in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118 (1984), where the Court noted,

> In this case, as in *Metromedia*, we are called upon to adjudge the constitutionality under the First

> Amendment of a local government's response to this recurring dilemma – namely, the clash between the public's aesthetic interest in controlling the use of billboards, signs, handbills, and other similar means of communication, and the First Amendment interest of those who wish to use these media to express their views, or to learn the views of others, on matters of importance to the community.
>
> In deciding this First Amendment question, the critical importance of the posting of signs as a means of communication must not be overlooked. Use of this medium of communication is particularly valuable in part because it entails a relatively small expense in reaching a wide audience, allows flexibility in accommodating various formats, typographies, and graphics, and conveys its message in a manner that is easily read and understood by its reader or viewer. There may be alternative channels of communication, but the prevalence of a large number of signs in Los Angeles is a strong indication that, for many speakers, those alternatives are far less satisfactory.

Id. at 819, 104 S. Ct. at 2136. In light of this Court's prior decisions involving sign restrictions, the City's cavalier attitude toward the First Amendment principles at stake here cannot be supported.

Moreover, while the Fourth Circuit incorrectly held that the North Charleston Sign Regulations – despite being a prior restraint on speech – did not need to contain any procedural safeguards because they were content-neutral, the court did recognize that billboards enjoy First Amendment protection. *Covenant Media of S. C., LLC v. City of N. Charleston*, 493 F.3d 421, 424 (4th Cir. 2007). The court noted, "[a]lthough billboards are important communication tools that convey political, social, and, most commonly, commercial messages, they create unique issues apart from their communicative function because they are 'large, immobile, and permanent structures.'" *Id.* (citing *Metromedia,* 453 U.S. at 502, 101 S. Ct. at 2889). Thus, while signs do create unique issues for municipalities to consider, the fact that they are protected by the First Amendment is beyond dispute. *E.g.*, *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 818 (6th Cir. 2005) ("Billboards and other visual signs, it is clear, represent a medium of expression that the Free Speech Clause has long protected"); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1402-03 (8th Cir. 1995) ("signs are a form of expression protected by the Free Speech Clause").

Equally as unpersuasive is North Charleston's attempt to dismiss precedent from other circuit courts that addresses licensing schemes for other expressive activity such as adult entertainment or political demonstrations. *See* Brief in Opposition, pp. 12-14. As this Court noted in *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 779-81, 124 S. Ct. 2219, 2223-24 (2004), "'[t]he core policy underlying *Freedman* is that the license for a ***First Amendment-protected business*** must be issued within a

reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech.'" *Id.* at 780, 124 S. Ct. at 2224 (emphasis added). Thus, the question is not what type of First Amendment-protected business activity the courts are considering, but whether the business for which a license is required is protected by the First Amendment. *Id.* This Court's decisions in *Ladue*, *Metromedia*, and *Taxpayers for Vincent* establish that the posting of signs and billboards is protected by the First Amendment. Thus, the many precedents requiring procedural safeguards during the licensing of protected speech activities, such as parades, demonstrations, and exhibitions of movies, plays, or other entertainment, are applicable.

II. RESPONDENT'S SUGGESTION THAT THE CITY'S PERMIT REQUIREMENT APPLIES ONLY TO NON-COMMUNICATIVE CONSTRUCTION ACTIVITY IS CONTRARY TO THE TEXT OF THE REGULATION.

Equally as unpersuasive as the City's attempt to remove First Amendment protections from billboards is Respondent's attempt to assert that this Court's procedural safeguard jurisprudence does not apply in this instance because the permitting requirement was triggered by the size of the proposed physical structure and not its categorization as a sign or billboard. *See* Brief in Opposition, pp. 11-13. Not only does this Court's holding in *Discovery Network* undermine such an assertion, but the plain language of the Sign Regulations renders it ridiculous.

The Fourth Circuit noted below that the City's sign code "required that a permit be issued before a billboard could be constructed, and billboards were required to comply with certain requirements." (4a). Contrary to the City's insinuation however, billboards were not the only signs that required a permit. *See* Sign Regulations, § 7.2. Indeed, the district court correctly noted that the North Charleston regulations explicitly stated that "[n]o building, structure or sign requiring a permit or any part thereof shall be erected . . . until the required permits have been erected." (39a). Thus, the permit requirement was not triggered solely by an applicant seeking to display a billboard, but rather nearly any sign, including political or campaign signs and signs expressing religious or ideological views. *See* Sign Regulations, §§ 8-5, 8-6(c) (establishing that all signs, of whatever size, that convey off-premise messages are billboards and are required to have a permit). Moreover, any sign over 35 square feet in size, including a noncommercial sign, was required to have a permit. *Id.* Thus, the permit requirement contained in the Sign Regulations was applicable to nearly all signs. Clearly local governments should not be allowed to hold such applications indefinitely without response.

III. THE CIRCUIT COURTS HAVE REACHED DIFFERING CONCLUSIONS AS TO THE HOLDING OF *THOMAS*.

The City asserts that Petitioner has identified no dispute among the circuit courts with respect to *Thomas* because "[t]he cases which have considered the decision time limit issue in the context of new

billboards [*sic*] permits have all rejected Covenant's position." *See* Brief in Opposition, p. 18. The City's argument is twice flawed. First, Respondent subtly attempts to recast this petition by focusing solely on the permitting of billboards rather than First Amendment-protected activity. Second, by focusing on billboards, the City ignores the growing number of cases where *Thomas* and its early progeny – including "billboard" cases like *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003) – have been applied to what Respondent classifies as "cases involving communicative conduct by live human beings." The application of *Thomas* to all manner of ordinances that operate as prior restraints on speech, thereby removing the need for any procedural safeguards, is increasing. There is no justification for the notion that such applications should be able to be held indefinitely simply because a code is content-neutral.

The City's attempt to differentiate decisions involving billboards from those addressing other speech activity is mistaken. In the Tenth Circuit's opinion in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004), the plaintiff brought facial and as-applied challenges to the ordinance which required a permit to conduct a demonstration on public property. *Id.* at 1250. Relying upon *Thomas*, the Tenth Circuit held that, because the ordinance was content-neutral, it did not need to contain any time limits. *Id.* at 1259-60. The Tenth Circuit also affirmed the district court's conclusion that the plaintiff's as-applied challenge failed, finding that the roughly 240-day time period to process an application for a demonstration permit did not violate the plaintiff's rights. *Id.* at 1260-62;

see also Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1032 (9th Cir. 2006).

Similarly, as mentioned in Petitioner's opening brief, in the Ninth Circuit's opinion in *Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1138-39 (9th Cir. 2004), *Thomas* was interpreted to strip any procedural safeguard requirement from an ordinance requiring the issuance of permits for a First Amendment-protected activity. *Southern Oregon* is alarming because it relied on *Thomas* and the Eleventh Circuit's decision in *St. Petersburg* for the premise that no time limits are needed in a content-neutral licensing scheme. *Id.* at 1138; *see also Zen Music Festivals, LLC v. Stewart*, 2004 WL 1660452 (N.D. Tex. July 23, 2004) (relying on *Thomas* and *St. Petersburg* to uphold constitutionality of mass gatherings act with no time limits on processing of applications); *also Jews for Jesus, Inc. v. Port of Portland*, 172 Fed. Appx. 760, 764 (9th Cir. 2006) (applying *Southern Oregon* to hold that prior restraint for permitting speech activity in airport need not contain safeguards).

That circuit courts are applying what the City would have this Court believe are simply "billboard" decisions to government restrictions on "true" speech completely undermines Respondent's argument. There is no reason to differentiate the analysis of prior restraints on signs from other speech activities. Thus, Respondent's criticism of Petitioner's reliance on non-sign related cases to show conflict among the circuits is unfounded.

Given the contrast between the application of *Thomas* in *Southern Oregon*, *Utah Animal Rights*, and *St. Petersburg*, and the case law noted in Petitioner's opening brief – *e.g.*, *Lusk v. Village of*

Cold Spring, 475 F.3d 480, 492-93 (2d Cir. 2007), *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 296 n.12 (5th Cir. 2002), *Southworth v. Board of Regents*, 307 F.3d 566, 589 (7th Cir. 2002) – Respondent's effort to show uniformity among the circuits by focusing only on billboard cases fails.

Such lack of uniformity can also be seen through the Ninth Circuit's handling of the petition for rehearing en banc that was filed in *Southern Oregon*. *See Southern Ore. Barter Fair v. Jackson County*, 401 F.3d 1124 (9th Cir. 2005). While the Ninth Circuit ultimately denied the petition, seven judges from the court joined in filing a dissent from the decision to deny the petition. At the crux of the dissent was the Ninth Circuit's application of this Court's decision in *Thomas*, along with the reliance on the Eleventh Circuit's decision in *St. Petersburg*. *Id.* at 1126-29. Just as the Seventh Circuit noted in *Southworth*, the dissenters recognized,

> *Thomas* did not decide that a content-neutral time place, and manner regulation need not include any deadline for administrative review; the ordinance in *Thomas,* indeed, had such a deadline – twenty-eight days. *See* 534 U.S. at 318, 122 S. Ct. 775. Instead, the Court decided only that two *Freedman* requirements – a deadline for *judicial* review of a *censor's* decision, and the requirement that the government must initiate litigation – do not apply to content-neutral schemes. *See id.* at 321, 122 S. Ct. 775 ("Petitioners contend that the Park District, like the Board of

> Censors in *Freedman,* must initiate litigation every time it denies a permit and that the ordinance must specify a deadline for judicial review of a challenge to a permit denial. We reject those contentions.").

401 F.3d at 1126. Moreover, the dissenting judges explicitly rejected Respondent's suggestion that post-hoc relief (referred to as "ad-hoc" in Respondent's Brief) is the more appropriate forum to review problems in a permitting scheme. *Compare* Brief in Opposition, pp. 23-24, *with* 401 F.3d at 1127 ("Post-hoc relief is not a fully adequate equivalent of the right to speak when and where one chooses").

While *Southern Oregon* and *St. Petersburg* held that abuses could be adequately remedied through as-applied challenges – 372 F.3d at 1140, 348 F.3d at 1282 – as evidenced by the Tenth Circuit's opinion in *Utah Animal Rights* and the Fourth Circuit's decision below, such abuse is routinely swept under the rug as permissible under the circumstances, or merely negligence. As a result, litigants are becoming increasingly powerless to insist upon prompt decisions as to speech permits.

CONCLUSION

The City of North Charleston's blatant disregard for the important First Amendment principles that are at stake in this case exemplifies the need for the Court to grant this petition and restore the proper balance in prior restraint jurisprudence. The increased application of the erroneous interpretation of *Thomas* threatens to

eliminate the requirement that governments make prompt decisions as to speech permits. Future applicants for newsracks, parades, signs, and many other First Amendment-protected activities will be subject to indefinite delays. Such delays will result in important speech being silenced.

Even if permitting delays are unrelated to the content of the proposed speech, the fact remains that without specific time limits an applicant's voice can be suppressed indefinitely without consequence. This result violates all of the principles cited by this Court in establishing procedural safeguards. Whether or not a sign code, a demonstration ordinance, or any other speech licensing provision requires an applicant to divulge the content of the proposed speech is simply irrelevant to the question of whether government officials should be able to assert a "pocket veto" to deny the speech activity. Officials should be required to respond to such applications within a short, definite time frame. Thus, the Court should grant this petition and bring an end to the disparate rulings among the circuits on this critical issue.

DATED this 28th day of December, 2007.

Respectfully submitted,

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